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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Luis Virata, an individual,
10 Plaintiff,
11 vs.
12 Eric Zemke, an individual, et al.,
13 Defendants.
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No. CV11-0988-PHX DGC

ORDER

15 Plaintiff's complaint alleges consumer fraud against all Defendants. Doc. 1 at 17.
16 After filing an answer (Doc. 15), Defendant Steve Wallace moved to dismiss on the sole
17 ground that as a member of an Arizona LLC he is not liable for acts performed in
18 furtherance of the LLC. Doc. 22. Plaintiff opposes (Doc. 32), and Defendant filed a
19 reply (Doc. 33). No party has requested oral argument.

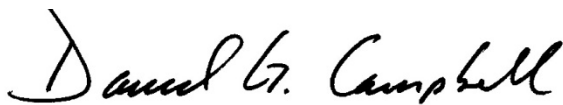
20 Although a member of an LLC is not personally liable for debts and obligations of
21 the LLC "solely by reason of being a member," A.R.S. § 29-651, Defendant fails to show
22 that personal liability cannot attach for fraud in which Defendant is alleged to have
23 participated. *See, e.g., Jabczynski v. S. Pac. Mem'l Hosps., Inc.*, 579 P.2d 53, 58 (Ariz.
24 App. 1978) ("A director who actually votes for the commission of a tort is personally
25 liable, even though the wrongful act is performed in the name of the corporation."); *cf.*
26 A.R.S. § 29-651 (liability for members precluded only if liability is alleged "solely by
27 reason of being a member"). The motion to dismiss will be denied.
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1 The motion to dismiss is also untimely. The Rule 12(b)(6) motion was filed after
2 the answer was filed, which renders it untimely. Fed. R. Civ. P. 12(b); *Augustine v.*
3 *United States*, 704 F.2d 1074, 1075 n.3 (9th Cir. 1983). The Court may construe it as a
4 motion for judgment on pleadings under Rule 12(c), but only if the pleadings have
5 closed. Fed. R. Civ. P. 12(c); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980).
6 “[T]he pleadings are closed for the purposes of Rule 12(c) once a complaint and answer
7 have been filed, assuming . . . that no counterclaim or cross-claim is made.” *Doe v.*
8 *United States*, 419 F.3d 1058, 1061. Cross-claims have been asserted against Defendant
9 Wallace by other defendants in this case on July 28, 2011 (Doc. 35), and therefore a Rule
10 12(c) motion is untimely.

11 As a final note, Defendant’s counsel cites in part to an unpublished Arizona Court
12 of Appeals opinion, *In re Real Prop. Located at 4720 N. Nesting Lane*, 2010 WL 716106
13 *2 (Ariz. App. 2010), in violation of Arizona rules of procedure and without disclosing it
14 as an unpublished opinion. Counsel is advised that future citations to unpublished cases
15 without disclosure are inappropriate.

16 **IT IS ORDERED** that Defendant Wallace’s motion to dismiss (Doc. 22) is
17 **denied**.

18 Dated this 10th day of August, 2011.

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David G. Campbell
23 United States District Judge
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